***United States Court of Appeals***

***for the Second Circuit***

# APPELLEE'S BRIEF

ORIGINAL
WITH PROOF
OF SERVICE

77-7216

# UNITED STATES COURT OF APPEALS

*for the*

# SECOND CIRCUIT

B

P/S

ASSOCIATED METALS & MINERALS CORPORATION,

Plaintiff-Appellee-Cross-Appellant,

-against-

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Defendant-Appellee,

-and-

APPALACHIAN INSURANCE COMPANY OF PROVIDENCE,

Defendant-Appellant.

UNITED STATES COURT OF APPEALS
FILED
AUG 22 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

## BRIEF OF HARTFORD ACCIDENT & INDEMNITY COMPANY, DEFENDANT-APPELLEE

BEREL, NAVARRA & MULLEN, P.C.
19 East Ninth Street
New York, New York 10003
Attorneys for Hartford Accident &
Indemnity Company, Defendant-Appellee

(6532)

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IN THE

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Defendant-Appellee,

-and-

APPALACHIAN INSURANCE COMPANY OF PROVIDENCE,

Defendant-Appellant.

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BRIEF OF HARTFORD ACCIDENT & INDEMNITY, COMPANY, DEFENDANT-APPELLEE.

## ISSUE PRESENTED

Does the exclusion contained in a comprehensive policy of insurance specifically excluding bodily injury or property damage arising out of the conduct of a joint venture afford coverage?

## STATEMENT OF THE CASE

### A. Nature of the Case

ASSOCIATED METALS & MINERALS CORPORATION ("Associated") commenced this action pursuant to 28 U.S.C. Section 2201, requesting that the Court declare that HARTFORD ACCIDENT & INDEMNITY COMPANY ("Hartford") be

required to defend and indemnify ASSOCIATED against the claim of GRISMER FARMS, INC. ("Grismer"), in an action pending, and further requested that the Court declare that the claims asserted in such action that exceed the amount of the HARTFORD's policy be covered and indemnified by APPALACHIAN INSURANCE COMPANY OF PROVIDENCE ("Appalachian").

B. Disposition Below

The District Judge held that HARTFORD is entitled to judgment declaring that it is under no liability to ASSOCIATED in respect of the policies in suit, and held that APPALACHIAN is required to defend ASSOCIATED in the South Dakota lawsuit and to reimburse ASSOCIATED for expenses incurred to date, and that HARTFORD is not liable under its policy.

C. Statement of Facts

The facts are not in dispute.

1. The Parties

ASSOCIATED is a corporation incorporated under the laws of the State of New York with its principal office at 733 Third Avenue, County, city and State of New York (A-10a). GULF CHEMICAL & METALLURGICAL COMPANY ("Gulf") is a division of ASSOCIATED (A-10a).

HARTFORD is a Connecticut insurer licensed to do insurance business in New York (A-10a).

APPALACHIAN is a Rhode Island insurance corporation wholly owned by Allendale Insurance Company, also a New York licensed insurer (A-10a).

2. The Insurance Policies Issued by HARTFORD and APPALACHIAN to ASSOCIATED

HARTFORD's policy contains the following provision:

> "This insurance does not apply to bodily injury or property damage arising out of the conduct of any partnership or joint venture of which the insured is a partner or a member and which is not designated in this policy as a named insured." (A-11a; Vol. 9 Exhibits).

This exclusion is contained in the declarations portion of said policy, on the first page of same, and is a separate paragraph within the body, II PERSONS INSURED. The HARTFORD policy provides property damage limits of up to $100,000.00.

APPALACHIAN issued its Special Risk Policy to ASSOCIATED for all excess liability on all operations of ASSOCIATED, and provided coverage of up to $10,000,000.00 in excess of a retained limit of $25,000.00, not otherwise covered by other insurance policies, including the HARTFORD policy.

The APPALACHIAN policy did not contain any joint venture exclusionary provision.

3. The South Dakota Action

In March 1976, GRISMER instituted an action against ASSOCIATED and other defendants. GRISMER sought damages in the sum of $3,500,000.00 plus interest in that action.

The complaint in that action alleges in Paragraph X that ASSOCIATED and MINERAL RESEARCH & DEVELOPMENT CORPORATION ("Mineral") "were both engaged in interstate commerce", and as against each of the other defendants alleged and identified said defendants as being separate entities, and all of the defendants in said action cross-claim against each other, except that GRISMER and MINERAL do not cross-claim against each other (A-33a, 45a).

## ARGUMENT

### The Court Below was Correct in Holding That the HARTFORD Policy Does Not Cover the Claims Asserted Against ASSOCIATED in the South Dakota Action.

On July 16, 1973, GULF, a Division of ASSOCIATED, entered into a contract with MINERAL and recited in said contract the desire of the parties to enter into a "joint venture" (A-11a).

The District Court in distinguishing Shehee v. Aetna Casualty & Surety Co., 122 F. Supp. 1 (W.D.La. 1954) compared the exclusionary clause contained in the policy involved therein which was unlike the clear language in the instant suit. The language of the exclusionary clause in Shehee stated "this agreement does not apply ... to the liability of the assured as the member of a partnership...". In Shehee the Court found that the exclusionary provision was inapplicable as coverage was excluded in respect of the "liability of the assured as the member of a partnership" (A-16a).

What HARTFORD sought to exclude from its policy was damage "arising out of" (thus "caused by") the "conduct" of a joint venture in which ASSOCIATED had participated without having designated the joint venture as a named assured (A-16a).

The District Court correctly found that ASSOCIATED was involved in a genuine joint venture with MINERAL, and that therefore the clear language of the exclusionary provision in HARTFORD's policy should prevail (A-18a).

To permit ASSOCIATED to rely upon its "vendor's" endorsement so as to fall within the ambit of coverage would require the District Court or this Appellate Court to re-write the policy of insurance. The "vendor's endorsement" contemplated that the insured and the vendor, with the vendor undertaking the distribution or sale of the insured's product be "in the regular course of the vendor's business". In the instant case, ASSOCIATED is attempting to re-write a policy of insurance and to call upon this Court to afford coverage under the "vendor's endorsement" as though the joint venture was engaged in the regular course of its business, which is obviously not the case, as the joint venture is not an insured under the terms of the policy issued by HARTFORD (A-20a).

The HARTFORD exclusionary clause was as broadly written as the coverage clause and irrespective of the application of the so called pleading test, the exclusion exempted the type of loss, namely loss incurred arising out of the conduct of the joint venture, from coverage

under the policy. Hardware Mutual Casualty Co. v. Mason - Moore - Tracy, Inc., 194 F.2d 173.

ASSOCIATED attempts to elasticize coverage that does not in fact exist, by attempting to allude to liability involved in the South Dakota lawsuit, rather than coverage, by claiming that it alone manufactured the offending product which caused the damage to GRISMER, and that its joint venturer MINERAL, since MINERAL merely sold the product, was only vicariously liable. ASSOCIATED claims coverage despite the specific exclusionary language contained in HARTFORD's policy.

HARTFORD on the face of the policy negotiated and bargained for by ASSOCIATED, did not limit the exclusion to vicarious liability as a joint venturer. The exclusionary clause as written cannot be given the narrow construction that plaintiff wishes to impose upon it without doing violence to its plain language. (See A-16a; 17a).

## CONCLUSION

For the reasons set forth above, the judgment entered below should be affirmed, in that HARTFORD is not liable to indemnify ASSOCIATED from all claims in the South Dakota action.

Respectfully submitted,

BEREL, NAVARRA & MULLEN, P.C.
Attorneys for HARTFORD ACCIDENT & INDEMNITY COMPANY, DEFENDANT-APPELLEE

HAROLD B. BEREL
Of Counsel

August 17, 1977

STATE OF NEW YORK )
COUNTY OF NEW YORK) ss .

Edward J. Butterworth, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 446 W 58 St NY.

That on the 22nd day of AUGUST, 19 77, deponent personally served the within BRIEF OF HARTFORD ACCIDENT & INDEMNITY COMPANY, DEFENDANT-APPELLEE upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses

PASKUS, GORDON & HYMAN
Attorneys for Plaintiff-Appellee-Cross-Appellant
733 Third Ave.
New York, N. Y. 10017

Edward J. Butterworth

Sworn to before me this

22nd day of August, 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

STATE OF NEW YORK )
COUNTY OF NEW YORK) ss .

Murray H. Berman, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 311 W 97th St New York NY.

That on the 22 day of AUGUST, 1977, deponent personally served the within BRIEF OF HARTFORD ACCIDENT & INDEMNITY COMPANY, DEFENDANT-APPELLEE upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

ABRAMS & MARTIN, P.C.
Attorneys for Defendant-Appellant
92 Fulton St.
New York, N. Y. 10032

Murray H Berman

Sworn to before me this

22nd day of August, 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0950008
Qualified in Queens County
Commission Expires March 30, 1979